

BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON, D.C. 20268

DSCF STANDARD MAIL LOAD LEVELING

Docket No. N2014-1

**UNITED STATES POSTAL SERVICE MOTION TO STRIKE PORTIONS OF  
THE REPLY AND SUPPLEMENTAL BRIEF OF  
THE PUBLIC REPRESENTATIVE**  
(March 6, 2014)

**I. INTRODUCTION**

The United States Postal Service (Postal Service) hereby moves to strike chapter IV, sections A.1 and A.3, pages 27-33 and 36-39, and chapter V, sections A and B, pages 39-43, from the Reply and Supplemental Brief of the Public Representative filed on February 27, 2014.<sup>1</sup> To the extent that the Commission denies this motion, the Postal Service asks that the identified material be treated as argument or comment and not as record evidence, consistent with prior practice.<sup>2</sup>

In the above identified sections of its Reply Brief, the Public Representative improperly attempts to introduce new analysis of the Load Leveling initiative in the form of factual assertions, data analysis, and related hypotheses long after the February 18, 2014 deadline for submission of intervenor testimony established by PRC Order No. 1932 (Dec. 30, 2013). These sections of the Public Representative's Reply Brief are in part based on

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<sup>1</sup> Reply and Supplemental Brief of the Public Representative (PR Reply Brief), PRC Docket No. N2014-1 (Feb. 27, 2014) at 28.

<sup>2</sup> See, e.g., PRC Advisory Opinion on Mail Processing Network Rationalization Service Changes, PRC Docket No. N2012-1 (Sept. 28, 2012) at 20.

information provided in the record but also include undocumented and untested opinions and other assertions that are devoid of any record citation and, in substance, consist of new testimony that has not been subject to any form of cross-examination, and to which there has been no opportunity to respond with rebuttal testimony.<sup>3</sup>

If interested parties are to have faith in the Commission's advisory opinion, the Commission must ensure that the opinion is a product of a process that satisfies the procedural requirements currently in place under the Commission's Rules of Practice and Procedure. The Public Representative's reliance on extra-record factual assertions presented to the Commission is contrary to the Commission's rules. Without a timely opportunity to review the data and analysis underlying the figures, probe them through existing discovery processes, and submit rebuttal testimony, the Postal Service has no meaningful way to challenge the Public Representative's calculations at this late date. Nor does the Commission have any principled way to assess their validity.

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<sup>3</sup> The Postal Service distinguishes the above-listed objectionable sections of the Public Representative's Reply and Supplemental Brief from chapter III of that same brief, which presents the Public Representative's argument regarding data filed in USPS Library References N2014-1/NP8 and NP9 shortly before initial briefs were due. Provided that the Postal Service has the opportunity to respond, the Postal Service does not object to the argument presented in chapter III because the Public Representative's ability to present that argument as part of its January 20, 2014 Initial Brief was affected by the proximity of the filing of Library References N2014-1/NP8 and NP9 to the deadline for submission of that brief. See United States Postal Service Motion for Leave to File a Reply Brief in Response to the Reply and Supplemental Brief of the Public Representative, PRC Docket No. N2014-1 (Mar. 6, 2014).

**II. THE COMMISSION SHOULD STRIKE CHAPTER IV, SECTIONS A.1 AND A.3 OF THE PUBLIC REPRESENTATIVE’S REPLY BRIEF**

**A. The Public Representative Introduces And Relies On New Testimony Outside Of The Official Record.**

Through chapter IV, sections A.1 and A.3 of its Reply Brief, the Public Representative seeks to introduce for consideration by the Commission information that, in all material respects, constitutes testimony on which the Commission can rely only if other parties have been provided an opportunity for cross-examination and rebuttal.<sup>4</sup> The Commission’s Rules of Practice and Procedure establish the process for determining the evidentiary status of relevant information submitted by parties. See 39 C.F.R § 3001.30(e). The assertions at sections A.1 and A.3 of chapter IV of the Public Representative’s Reply Brief should have been introduced at the proper time in the procedural schedule so that other parties could cross-examine the Public Representative’s statements. Examples of testimonial statements from the Public Representative’s brief that should not be accorded any weight by the Commission include the Public Representative’s assertion that:

[M]any . . . delivery related issues can be attributed to other sources, including changes in the postal network and an increase in parcel volume. . . . The Postal Service’s service performance data shows that DSCF Standard Mail currently meets service performance objectives. Thus, the load leveling plan appears to degrade DSCF Standard Mail service without remedying a defined problem. . . .

The Public Representative has not filed timely testimony asserting the existence of alternative causes of the delivery issues the Postal Service seeks to

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<sup>4</sup> The Postal Service addresses the appropriate treatment of chapter IV, section A.2 in its Supplemental Reply Brief of The United States Postal Service in Response to the Reply and Supplemental Brief of the Public Representative, PRC Docket No. N2014-1 (Mar. 6, 2014).

fix through its Load Leveling Plan, which would have been subject to cross-examination and rebuttal. Accordingly, the Public Representative has forfeited the opportunity to introduce evidentiary support for its argument that because the Postal Service has purportedly managed to successfully fulfill service obligations, Load Leveling, in the Public Representative's view, is apparently a solution in search of a problem. This argument has no basis and ignores the ample testimony submitted in this docket detailing the impact of disproportionately heavy mail volume with a Monday delivery expectation on carrier workhours, and the processing and dispatch of Monday collection mail. There has been no opportunity to test through adversarial methods the Public Representative's claim at page 28 of its Reply Brief that service performance scores prove that there is no issue with Monday delivery.

At page 30 of its Reply Brief, the Public Representative argues that "[t]he Postal Service makes an institutional decision not to deliver mail that is entered on Thursday on Day 2, which is Saturday."

This statement is a testimonial assertion of a Postal Service "institutional decision" which, by virtue of its presentation in a reply brief, has not been the subject of cross-examination and for which there has been no opportunity to offer rebuttal evidence.

In addition, at page 37 of its Reply Brief, the Public Representative claims that "[b]ased on the information provided in this proceeding, it appears that the implementation of Phase 1 of [Mail Processing Network Rationalization] has placed a strain on mail processing and delivery networks." The Public

Representative asserts the existence of causation where it may be that only a correlation exists.<sup>5</sup> By waiting until the filing of its Reply Brief to make this assertion, the Public Representative eliminates the opportunity for cross-examination and rebuttal testimony.

Collectively, these statements constitute inappropriate extra-record factual assertions, which cannot be properly admitted as evidence, as they were offered so late in the process. Elevation of extra-record assertions to the status of record evidence, especially when they lack foundation and have not been subject to cross examination, violates the Commission's Rules of Practice and Procedure.

**B. The Public Representative Relies On New Testimony To Assert New Arguments That Should Have Been Presented In Its Initial Brief.**

In addition to presenting information that would more properly be classified as testimony, which the Postal Service and other parties have had no opportunity to cross-examine or rebut, the Public Representative also has introduced a number of new arguments in its Reply Brief. These new arguments are not based on, and do not respond to any, statements or claims made in any initial brief, and are based on information readily available at the time that initial briefs were due. The Public Representative has not asserted the existence of any extraordinary basis for opening these new lines of argument in its Reply Brief. Accordingly, the Commission should strike these arguments.

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<sup>5</sup> For the moment, the Postal Service will put aside the fact that the assertion of causation contradicts the argument at pages 28-33 of the Public Representative's Reply Brief that there is no problem to be corrected at all.

This strategy should not be allowed to become normal procedure under the Commission's watch. It would allow parties to withhold their substantive arguments until the very last moment, when they cannot be refuted. Instances of the Public Representative's new arguments, based on information available when initial briefs were due, are listed below.

- Chapter IV, Section A.1: The Public Representative argues that, because service performance data still meet target, a change is unnecessary. Under this argument, the Postal Service's authority to adopt operational changes could be exercised only to address situations where a service performance failure has occurred. Had this argument been included in the Public Representative's Initial Brief, the Postal Service would have addressed the many flaws with this position.
- Chapter IV, Section A.3: The Public Representative uses inaccurate analysis from outside of the record to reach the false conclusion that the difficulties with Monday delivery are due to other factors, particularly Phase 1 of Mail Processing Network Rationalization. The Public Representative reaches the conclusion that additional capacity will be required at facilities implementing load leveling, based solely on the statement that more space was required during the South Jersey operations test. As the Postal Service would have explained if provided an opportunity to respond to this argument, utilization of more floor space and trailers to

segregate test mail does not mean that the space is not available already.<sup>6</sup>

These new arguments should have been part of the Public Representative's Initial Brief.

### **III. THE PUBLIC REPRESENTATIVE IMPROPERLY RELIES ON NON-EVIDENTIARY COMMENTS TO SUPPORT ITS MISAPPLICATION OF SECTION 3622(d)(1)(E) EXIGENT RATE REVIEW CRITERIA**

In chapter V of its Reply Brief, the Public Representative argues that the "Postal Service's failed communication with postal customers is inconsistent with 'best practices of honest, efficient, and economical management.'" PR Reply Brief at 39. This argument appears to augment the Public Representative's initial criticism of the Load Leveling Plan as inconsistent with title 39 because of an alleged failure to comply with the "best practices of honest, efficient and economical management" standard in section 3622(d)(1)(E). Initial Brief of the Public Representative (PR Initial Brief), PRC Docket No. N2014-1 (Feb. 20, 2014) at 24. Since chapter V of the Public Representative's Reply Brief does not cite to the evidentiary record, the Commission should strike it and accord it no consideration.

First, in pages 24 to 26 of its Initial Brief, the Public Representative concludes that the Load Leveling Plan is inconsistent with "best practices of honest, efficient, and economical management." As discussed extensively in section II.A.2 of the Postal Service's Reply Brief, the section 3622(d)(1)(E)

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<sup>6</sup> This argument by the Public Representative does not rely on the information provided in response to PR/USPS-T1-25(b), (c)-(f), and as such, should have been raised in the Public Representative's Initial Brief.

criteria referenced by the Public Representative apply exclusively to the very narrow context of Commission evaluation of a Postal Service proposal to raise market-dominant product prices above the price cap in exigent circumstances. See *generally* Reply Brief of the United States Postal Service (USPS Reply Brief), PRC Docket No. N2014-1 (Feb. 27, 2014) at 5-8. The Commission itself has clarified that the criteria in section 3622(d)(1)(E) relate to “consideration of . . . management practices relevant to the issue of whether *rate adjustments* are ‘necessary.’” PRC Order No. 1926, Order Granting Exigent Price Increase, PRC Docket No. R2013-11 (Dec. 24, 2013) at 30-31 (emphasis added). As the propriety of an exigent rate adjustment is not at issue in this docket, application of the standard in section 3622 would be misplaced and contrary to congressional intent.

Second, as discussed extensively in section IV of the Postal Service’s Reply Brief, the Public Representative improperly cites to comments received by the Commission under Rule 20b of its Rules of Practice and Procedure and comments submitted to the Postal Service in response to its DSCF Standard Mail service standard rulemaking as evidence of the truth of the matters asserted within those comments. See *generally* USPS Reply Brief at 21-28. Chapter V of the Public Representative’s Reply Brief is littered with references to comments submitted to the Commission under Rule 20b and rulemaking comments that



have not been subjected to any form of adversarial scrutiny or any opportunity for rebuttal on the record in this docket.<sup>7</sup>

For example, in chapter V, section A of its Reply Brief, the Public Representative concludes that “the Postal Service ignored customer concerns and moved forward with the Request without addressing questions and concerns. . . .” PR Reply Brief at 41. Does the Public Representative invite the Commission to rely on the testimony of any witness in this proceeding to support such an assertion? No; it merely points to the Initial Brief of the American Postal Workers Union (APWU) and declares that it “agrees with the APWU’s assessment that . . . ‘the Postal Service has exhibited a regrettable lack of consideration for the needs and opinions of postal customers.’” *Id.* The APWU assessment, in turn, is based on “comments . . . in response to the Postal Service’s proposal.”<sup>8</sup> The Public Representative’s reference to the APWU allegation does not elevate the rulemaking and Rule 20b comments referenced by APWU to the status of record evidence. In contrast, there is ample factual record evidence that the Postal Service consulted extensively with mailers in developing the Load Leveling concept.<sup>9</sup> And that record evidence demonstrates that, after considering concerns and preferences expressed by mailers, the Postal Service was not persuaded to take an alternative approach to its Load

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<sup>7</sup> PRC Advisory Opinion on Mail Processing Network Rationalization Service Changes, PRC Docket No. N2012-1 (Sept. 28, 2012) at 20 n27 (“A factor to consider when determining how much weight is to be given to arguments presented on brief is the extent to which the material relies upon evidence in the record.”).

<sup>8</sup> Brief of the American Postal Workers Union, PRC Docket No. N2014-1 (Feb. 20, 2014) at 3.

<sup>9</sup> See USPS-T-1 at 8-11; Tr. Vol. 1 at 13, 14, and 20; and USPS Library Reference N2014-1/6.

Leveling initiative, disproving any claim that the mailers' concerns were ignored altogether.

The prudence underlying the Commission's Rule 20b exclusion of comments from the evidentiary record is reinforced by the argument at chapter V, section B of the Public Representative's Reply Brief. There, the Public Representative alludes to rulemaking comments submitted by the American Catalog Mailers Association (ACMA)<sup>10</sup> and Rule 20b comments submitted by Quad/Graphics<sup>11</sup> to argue that the Postal Service has "predetermined that the [Commission's] advice is irrelevant to the Postal Service's decision" and has "informed customers that the Load Leveling Plan will be implemented regardless of customer feedback and the Commission's advisory opinion." PR Reply Brief at 42. The February 3, 2014 ACMA rulemaking comments at page 3 convey the sentiment that some mailers "felt railroaded and were told this was a *fait accompli*." However, there has been no opportunity to examine any witness to explore the source or meaning of, or the basis for these sentiments.

Similarly, the February 19, 2014 Rule 20b Quad/Graphics comments at page 4 reference the January 10, 2014 industry webinar chaired by the Postmaster General<sup>12</sup> and put an even more questionable spin on his remarks during that webinar. Such representations do not fairly represent the Postmaster

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<sup>10</sup> PR Reply Brief at 42 n.98. ACMA rulemaking comments were appended to its Initial Brief.

<sup>11</sup> PR Reply Brief at 42 n.99. For an unknown reason, the Public Representative cites to a "brief" filed by Quad/Graphics. Since Quad/Graphics did not submit a Notice of Intervention, pursuant to Rule 20, the Commission properly received and segregated the Quad/Graphics February 19, 2014 filing as its informal expression of views pursuant to Rule 20b.

<sup>12</sup> See, USPS Library Reference N201401/6, 1-10-14.pdf.

General's comments. Moreover, they have not been introduced into this proceeding as evidence. They have not been subject to adversarial scrutiny and there has been no opportunity to respond to them via rebuttal testimony.

Contrary to the Commission's own Rules of Practice and Procedure, the Public Representative directs the Commission to base its advice on mere innuendo, which no parties had an opportunity to cross-examine or rebut. As the Public Representative bases its discussion and conclusions on matter not properly introduced to the evidentiary record as statements of fact, the Commission should disregard chapter V of the Public Representative's Reply Brief.

#### **IV. CONCLUSION**

In conclusion, the United States Postal Service hereby moves to strike portions of the February 27, 2014 Public Representative's Reply Brief for the aforementioned reasons.

Respectfully submitted,

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